No. 84-1667

IN THE
Supreme Court of the United States
October Term, 1985

Bethel School District No. 403, et al,
Petitioners,

v.

Matthew N. Fraser, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF
NATIONAL SCHOOL BOARDS ASSOCIATION
AS AMICUS CURIAE SUPPORTING PETITIONERS

GWENDOLYN H. GREGORY
Counsel of Record

Deputy General Counsel
National School Boards Association
1680 Duke Street
Alexandria, Virginia 22314
(703) 838-6712

AUGUST W. STEINHILBER
NSBA Associate Executive Director
and General Counsel

THOMAS A. SHANNON
NSBA Executive Director

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This brief amicus curiae in support of Petitioners is submitted with the written consents of counsel to all parties. Letters of consent are on file

with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who compose this nation's school boards are elected or appointed community representatives, most of whom are not professional educators. They are responsible under state law for

the fiscal management, staffing, continuity, educational productivity and standards of conduct of the public schools within their jurisdictions.

NSBA submits this brief in the belief that the school boards of this country are charged with the responsibility for, not only the education of the children within their charge, but also the inculcation of moral values of the community in which they are located.

School boards are responsible for setting the standards of conduct for the students, based upon the moral and ethical standards of the community. As publicly supported institutions, public schools are responsible to the parents and other members of the community to assure that the students, who are required to attend school, are subject to the rules of the

community.

Amicus believes that the opinion below evidences a lack of understanding of the mission of the public schools and, if allowed to stand, will result in the imposition on the schools of a court-imposed standard of conduct. Thus, the standard would be immune from the political process where school boards act for and on behalf of parents and other members of the community.

ISSUES PRESENTED FOR REVIEW

1. Do school boards have the discretion, under the U.S. Constitution, to interpret their own rules prohibiting the use of "obscene" language during school activities?

2. Is a school board rule prohibiting "obscene" language and gestures constitutionally infirm in the

absence of an explicit definition of "obscene" in the rule itself?

STATEMENT OF THE CASE

Amicus incorporates by reference the statement of the case contained in brief filed herein by Petitioners.

ARGUMENT

I. INTRODUCTION

The raison d'etre of school boards in this country is to assure that parents and other taxpayers in the community have a voice in the most important service provided by the state to its citizens - a free public education.

Parents are required by the state to entrust their children into the care of the public schools and the parents have a right to assume that the community's moral and educational values are observed and reinforced by the schools through

enforcement of the student code of conduct.

An affirmation of the decision below would nullify the power of the board and those charged with the education of the students - teachers, principals and the superintendent - from enforcing reasonable rules based upon community standards of decorum.

II. SCHOOL BOARDS, NOT COURTS OR STUDENTS, PROPERLY PRESCRIBE RULES OF CONDUCT AND DECORUM

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.... Milliken v. Bradley, 418 U.S. 717, 741.

Although school boards, like other public officials, must adhere to the

commandments of the U.S. Constitution, this Court has traditionally acknowledged that the environment of the elementary and secondary level school may necessitate the adoption of different rules than apply in other public places. Students have, at once, more rights and less rights than other citizens. Because they are required to attend school, the state has a duty to protect them while they are on school premises. The mandatory attendance laws also limit students' rights by restricting their freedom to come and go at will and by imposing certain rules of decorum which do not govern the behavior of other members of society.

Perhaps equally important as the school district's obligation to set academic standards is the duty to inculcate moral values, beliefs, and

ideology. State constitutions in their provisions creating a system of public schools include references to the importance of the inculcation of moral values. For example, the North Dakota Constitution states: "In all schools instruction shall be given as far as practicable in those branches of knowledge that tend to impress upon the mind the vital importance of truthfulness, temperance, purity, public spirit, and respect for honest labor of every kind." N.D. Const. art. VIII, section 3. For a discussion of other constitutional provisions see Gordon, Values Inculcation in Public Schools, 13 Journal of Law & Education, 523, 525 (Oct. 1984).

State legislatures have recognized the need for school districts to exercise disciplinary control over public school

students. Over two-thirds of the states statutorily grant school authorities the power to establish rules, regulations, and standards governing student conduct and disciplinary procedures. Most of the thirty-six statutes which endow schools with this authority speak in broad terms of maintaining an orderly atmosphere conducive to the schools' academic purposes. Some of the states also clearly place in the schools the responsibility to protect the moral welfare of their students by disciplining those whose behavior becomes detrimental to this purpose or is itself "immoral." See, e.g., Ala. Code section 16-1-114; Alaska Stat. section 14.30.045(2); Ark. Stat. Ann. section 80-1516; Hawaii Rev. Stat. section 298-11; Iowa Code section 282.3; Mo. Rev. Stat. section 167.161; N.Y. Educ.

Code section 3214,3(1); Ok. Stat. section 24-101; S.C. Code section 59-63-210; W.Va. Code section 18A-2-2.

Six states specifically list the use of vulgar or profane language by students as a legitimate cause for disciplinary action. Ariz. Rev. Stat. Ann. section 15-841B; Calif. Educ. Code section 48900(q); Ky. Rev. Stat. section 158.50(1); N.J. Stat. Ann. section 18A:37-2; Or. Rev. Stat. section 339.250(4); Tenn. Code Ann. section 49-6-3401(2). While three of these states, Arizona, California and New Jersey, indicate that only "habitual" use of such language warrants discipline, the other three permit school authorities to take disciplinary measures against any use of profanity or vulgarity.

The Bethel High School Disruptive

Conduct Rule, which prohibits "obscene, profane language or gestures," is a common rule found in many school district codes of conduct. In addition, school codes often include other provisions relating to decorum such as dress codes which prohibit the wearing of clothing which is "indecent, inappropriate or a safety hazard." These rules rarely, if ever, explain what is intended by the word "obscene," "profane" or "indecent" although undoubtedly the students know their meaning.

The court of appeals below placed great weight on a belief that the students attended the assembly in question "voluntarily" and that they indicated their approval of Fraser's speech by voting for him for graduation speaker. This analysis indicates that the court

sorely lacks an understanding of public schools and young people.

Neither the currriculum of the schools nor its code of conduct should be subjected to some kind of mandatory student plebiscite. Indeed parents and educational officials in the Bethel community would be justifiably outraged had the school district relinquished its disciplinary authority to a vote of the students.

An interesting study was conducted by a school principal in 1983 in order to determine the views of teachers, students and community members as to what should be included in a student conduct code. Although students' and adults' views were similar on matters such as stealing, they widely diverged on the question of whether students should be disciplined for usin

"obscene or inappropriate language, spoken or written, or gestures on school grounds." While 96% of parents, 91% of non-parents and 100% of teachers answered "yes," only 59% of the students replied "yes." The same dichotomy existed as to whether students should be prohibited from wearing "bare midriffs, halter tops, tube tops, shorts or cut-offs." Ninety-three percent of parents, 91% of non-parents, 100% of teachers and 38% of students answered "yes." Slaby, Developing an Effective Dress and Behavior Code, National Association of Secondary School Principals Bulletin, Reston, Virginia, January, 1983.

Amicus cites this study, not as definitive authority, but only to illustrate what should have been obvious to the courts below - that students have a

different view from parents and schoo
officials as to what should be included i
a student code of conduct. And, the fac
that students view conduct as appropriat
is no reason for the courts to rule, as
matter of law, that the students' view
should control. While students do no
"shed their rights at the schoolhous
door," neither do their first amendmen
rights endow them with the right to adop
their own rules of conduct. That is th
province of the elected representatives o
the parents and other adults in th
community.

This maxim of school board contro
over the operation of our public school
has repeatedly received the affirmation o
this Court. The Court has properl
recognized the importance of that contr
and has admonished the courts not

"second guess" school board rules, in the absence of clear constitutional infractions.

> The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities. We have repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. [Citations omitted.] The promulgation of a rule forbidding specified conduct presumably reflects a judgment on the part of school officials that such conduct is destructive of school order or of a proper educational environment. Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the

schools and rules that are not." New Jersey v. T.L.O., 105 S.Ct. 733, 744 at footnote 9 (1985).

III. THE TINKER STANDARD PERMITS REGULATION OF STUDENT SPEECH OUTSIDE THE CLASSROOM

A. Tinker standard applies only to political speech.

The lower court relies on Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) for its decision holding that a school board may not regulate any student speech outside the classroom in absence of a showing that the speech causes "substantial and material disruption."

The rules established in Tinker do not apply to the case at bar for two reasons: first, Tinker dealt with political speech rather than "obscenity;" and second, the Tinker speech was not related to any school-sponsored activity,

unlike the student assembly here. Both of these factors were crucial to the holding in the case.

In Tinker, this Court emphasized the fact that the school district had not prohibited wearing of all armbands, or of buttons or T-shirts with statements thereon, but had singled out black armbands worn as a symbol of the students' disagreement with the Viet Nam War -- a political statement. Although noting that in general students' first amendment rights in the public school context are not the same as those of adults, the Court held that as to silent political statements, a student's free speech right differs little in the school context than outside the classroom. That form of speech cannot be regulated except as to "time, place and manner" and so as to

prohibit "substantial and materi
disruption."

Thus, the reliance on the Tink
criterion of "substantial disruption"
misplaced in this case as it should app
only to regulation of politic
statements.

The fact that the statement at iss
was made during a political nominati
speech is irrelevant to the controlli
fact that the regulation by the scho
board was as to its "obscenity" not i
political content.

Although lower court decisio
dealing with political speech of studen
are quite consistent, they diverge
their application of the "substanti
disruption" standard to speech whi
raises questions of obscenity or moralit
For example, in Trachtman v. Anker, 5

F.2d 512 (2d Cir. 1977), cert. denied, 435 U.S. 925 (1977) the court upheld the denial of a high school newspaper editor's right to distribute a questionnaire surveying the sexual activities and birth control practices of his fellow students. The ground for the denial was that the results of the survey might invade the privacy of younger students, who might not be mature enough to handle the story's intimate information.

B. The school assembly is not a student-initiated "voluntary" activity.

The lower court, drawing a distinction between the classroom and the school assembly, holds that the Supreme Court standards for determining what is "obscene" apply equally to student speech in the context of school assemblies. In other words, the court believes that the

regulation of student speech in schoo assemblies requires a more stringen standard than that operating in th classroom. In the court's view a studen might be prohibited from saying somethin "indecent" in a classroom, but he coul say anything, even something barely abov the adult line of "obscenity," in a schoo assembly without fear of disciplinar action.

In Federal Communications Commissio v. Pacifica Foundation, 438 U.S. 72 (1978), this Court held that the F.C.C may regulate radio broadcasts which ar "indecent" because of the harm caused t young children involuntarily subjected t the programs in the home. The lowe court, however, distinguishes the hom environment from the school assemb because the school assembly is

"voluntary" student-initiated activity. But this distinction is meaningless. Just as a child may not be able to control the speech broadcast into his home, he cannot control the speech he hears in a student assembly and cannot leave to avoid it.

The lower court also attempts to analogize the so-called "voluntary" school assembly to the school library which was the subject of this Court's decision in Board of Education, Island Trees Union Free School District v. Pico, 457 U.S. 853, 102 S.Ct. 2799 (1982). In that case four Justices drew a distinction between the classroom and the library on the basis of the "voluntary" nature of the library.

However, Island Trees asserts that political speech in the library cannot be censored. But, assuming arguendo that Island Trees prohibited all censorship of

library books, the analogy is sti
misplaced. It cannot be said that
student "voluntarily" subjects him/herse
to spoken speech of other students in
school assembly in the same manner that
student voluntarily picks up a book in t
library. Although the students at Beth
had the option of attending the assemb
or a study hall, once they elected
attend, they were not permitted to leave.

**C. School boards have the duty
protect the students fr
indecent speech.**

Unlike the case of student initiat
non-school sponsored clubs, such as th
in Bender v. Williamsport, 741 F.2d
(3rd Cir. 1984), cert. granted, Feb.
1985, where it might be argued that
school has created a limited open foru
the activities in a school assembly
sponsored by the school and there may e

be said to be an endorsement by the school administration of much of what transpires during the assembly. Students might not perceive school endorsement of the political remarks made by students regarding the merits of one candidate over another. But, they are likely to perceive an endorsement, or at least a lax attitude, toward inappropriate or vulgar remarks made by a student speaker if the student is not disciplined for the remarks - regardless of whether those statements reach the level of "obscene" under Supreme Court rulings.

In addition to the question of "endorsement" of activities in the assembly, the school administration had an additional concern that students not be subjected to non-political speech which is offensive to them. Whatever a majority of

the students, particularly the ma
students, may have thought about Fraser
remarks, it is a reasonable assumpti
that a number of the females in t
audience were offended, particularly t
younger girls. And, the girls would ha
been less likely to complain than t
boys. Those girls, as well as their ma
counterparts who might be offended, have
right to expect the administration of t
school to protect them from "indecen
remarks, particularly since they were n
free to leave the auditorium.

IV. SCHOOL ENVIRONMENT REQUIRES REGULATION OF STUDENT SPEECH EVEN THOUGH NOT "OBSCENE" UNDER ADULT STANDARDS

It is unreasonable to require sch
boards to apply the same standards
"obscenity" which are used outside
school setting. School boards char

with guarding the moral welfare of students should have much greater flexibility in the adoption and implementation of rules which regulate "obscene" speech in the public school setting and certainly within the context of official school-sponsored programs. The court of appeals cites examples from Tinker of the playing field. That example is inapposite in that students might be permitted to use language there which would not be allowed in a school-sponsored game or athletic contest.

It is the view of the lower court that the school district is powerless to regulate indecent or inappropriate language of students, unless it is "obscene" within the Supreme Court standards applied to printed adult materials. Having decided that Fraser's

remarks were not "obscene," the cou
notes that the the question of whether
"went over the line of good taste a
became offensive" will be judged by t
student body "when they cast ballots
the school elections." The court th
points out that Fraser's candidate went
to win the election.

It is indeed discouraging that
federal court of appeals could serious
contemplate a notion that a group of hi
school students (which in many schoo
could include students as young as 13
14), through majority vote, should
given the absolute authority to overru
the officials of the school district as
the appropriateness of the admitt
"sexual innuendo" in a student's speech.

Whatever one may believe as to t
severity of the punishment which Fras

received, or as to the merits of the speech or its clever turn of phrase, the standard set by the court below is absurd.

In society at large minors do not have the right of access to all types of speech freely available to the adult community. Nor do those who supply these forms of speech have the right to provide them to minors. The point is, we do not ask children in a a larger public context whether they approve of, or want to be exposed to, a particular form of speech in order to determine the need to regulate their access and exposure to that speech. Nor is the essential question whether the speech is obscene by adult standards, but whether the speech may in some way be harmful to the welfare of children. Why the court of appeals feels that adult obscenity standards should apply in the

public schools is beyond reason.

Therefore, if a vote is in order, it is the parents and other adult members of the community who should cast it. If they believe the standards set by the Bethel school district are too conservative, it is <u>their</u> ballots which are relevant. Courts cannot, because of their own personal beliefs, suppress the right of the local community to elect its own local school board to set standards for their children, who are required by state law to attend the school.

The court below notes its concern that if school officials are given the "unbridled discretion" to apply local standards of decency, "it would increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior

in our public schools."

Amicus respectfully takes issue with this cavalier dismissal by the court of the attempts of local school boards to maintain suitable standards of conduct. Indeed, it is insulting to non-white parents at all economic levels to infer that they are not equally concerned that standards of decency and decorum be maintained in the schools.

Unlike the lower court below, Amicus is not puzzled at all by Petitioners citation of Island Trees in support of its position that school boards may regulate "vulgar" speech (even though the speech might not be "obscene" in an adult setting). Although that case does not answer definitively the question of whether school boards may remove books from the library based on their

"political" content, it does spea
definitively on the right of boards t
censor "vulgar" materials - even from th
library.

The Justices were unanimous tha
"there is a legitimate and substantia
community interest in promoting respec
for authority and traditional values b
they social, moral, or political." 10
S.Ct. 2799, 2806. (But four of thos
justices were not willing to extend tha
principle to include the right to remov
books from the library because of thei
"political" content.)

As noted above, the instant case doe
not involve political speech, so the lin
drawn by four of the plurality in Islan
Trees is not relevant here. The case wa
remanded for a finding as to whether "th
removal decision was based upo

constitutionally valid concerns" such as that the board believed the books to be "vulgar." The language of both the plurality opinion and Justice White's concurrence with the judgment implies that the Court would not interfere with a decision by the school board to remove library books which are deemed by the board to be "vulgar," regardless of whether the books would be held to be "obscene" under traditional first amendment standards for adult materials.

V. SCHOOL RULE PROHIBITING "OBSCENITY" IS NOT UNCONSTITUTIONALLY VAGUE

In a statement which appears to be somewhat of an afterthought, the court of appeals upheld the district court's decision that the Petitioners' disruptive conduct rule is unconstitutionally vague, uncertain, and indefinite under the

fourteenth amendment's due process clause. If that is so, then it is unlikely that any school code of conduct in the country would pass constitutional muster.

It would appear that the lower courts found the rule unconstitutional not because of its vagueness but because they disgreed with the school district's interpretation and application of the rule. The Supreme Court has ruled that, in absence of a clear constitutional violation, boards should be left to their own interpretation.

In Board of Education of Rogers, Ark. v. McCluskey, the Eighth Circuit Court of Appeals had ruled that a school board had "unreasonably" construed its regulation by extending its prohibition against the possession of "intoxicating liquors" to include 3.2% malt liquor (which is not

"intoxicating liquor" under the state statute). The Supreme Court reversed, per curiam, holding that, although a school board's interpretation of its rules may be so extreme as to be a violation of due process, that was not the case in this instance. The Court stated: "We conclude that the District Court and the Court of Appeals plainly erred in replacing the Board's construction of section 11 with their own notions under the facts of the case." 458 U.S. 966, 102 S.Ct. 3469, 3472 (1982).

Likewise, the courts below in this instance were not satisfied with the school district's interpretation of its rule prohibiting "obscenity" and, thus declared it unconstitutionally vague.

CONCLUSION

The court of appeals opinion seems to

emphasize certain factors in this case which are legally irrelevant, such as the fact that the student was an honor student, a recipient of awards for speaking, and the choice of the student body for the honor of speaking at the graduation ceremonies. One wonders if this case would be in the High Court had the student been a C student with a less refined gift for rhetoric.

District Judge Tanner even noted his "repugnance" in having to be involved in this situation. Indeed he should not have been involved. This is a situation which cries for a quiet solution by the officials of the school, the student and the student's parents. Perhaps a solution might have been reached, had the impending graduation not necessitated a hasty solution.

Nevertheless, the first amendment should not be trivialized as it was here, merely to accommodate the personal feelings of federal judges who disagree with the severity of the punishment inflicted on a student. The fact that a court believes that the punishment was too severe and perhaps another solution could have been reached does not give the court the authority to substitute its judgment for that of the school board and the school officials.

The school district had both the right and the duty to establish a code of conduct for the student body and the right and the duty to administer it in a fair manner. There is no assertion here that Fraser was not treated fairly. He had prior notice of the school's rules of conduct. He was notified of the charges

against him and given an opportunity to respond. During his session with the assistant principal he admitted the offense. He then received the opportunity to appeal to an administrative hearing officer, who affirmed the decision. No more than that is required under the U.S. Constitution.

Respectfully submitted,

Gwendolyn H. Gregory
Counsel of Record

Deputy General Counsel
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6712

AUGUST W. STEINHILBER
NSBA Associate Executive Director
and General Counsel

THOMAS A. SHANNON
NSBA Executive Director